IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.267 OF 1989

Namdeo Bandu Shelar .. Applicant

versus

The State of Maharashtra .. Respondent

...

Mr.R.V. More for the appellant.

Mr.D.P. Adsule, APP for the State.

CORAM : V.M. KANADE, J

DATED : 1st December 2004.

ORAL JUDGEMENT:-

1. The appellant has challenged the judgement and order passed by Sessions Judge, Sangli in Sessions Case no.31 of 1988. By the said judgement and order dated 29th march 1989, the trial Court convicted the appellant - accused for having committed an offence punishable u/s.304 II of the IPC

and sentenced him to suffer RI for 7 years and to pay fine of Rs.1,000/- and in default to suffer RI for three months. The prosecution case in brief is that the deceased Shiraj Maqbool Sanadi and the accused were both residents of Ichalkaranji, District Kolhapur. The prosecution case is that the accused had borrowed Rs.500/- from deceased Shiraj who used to demand that amount from the accused. However the accused had avoided to pay the amount. The deceased had assaulted accused Namdeo about 1 1/2 years before the incident and their relations were strained from that day. The prosecution case is that on 9th November 1987, accused Namdeo had gone to the house of Shiraj as he wanted to take him to Sangli. However, Shiraj was not in the house. He therefore came back at about 12 noon and both of them left Ichalkaranji and came to Sangli. Before leaving for Sangli, deceased Shiraj had told his brother Usuf that he would return from Sangli at about 3.00 p.m. The prosecution case is that at about 7 p.m. accused Namdeo took Shiraj to an open place near Parag Hotel and assaulted him with a knife on his abdomen and thereafter, the accused ran away from that place. The deceased took out the knife and threw it in the open space, took a rickshaw and went to the Civil

hospital, Sangli. The medical Officer Dr.Mulla was on duty who admitted Shiraj in the hospital and at that time, Shiraj told him that he was stabbed by accused Namdeo. A phone call was made to the Sangli Police station and according to Dr.Mulla, he informed the Sangli Police station that Namdeo had assaulted Shiraj. Thereafter, PW no.8 PI Dholam visited the hospital and he recorded the statement of injured Shiraj which was then sent to the police station. Thereafter, Shiraj was operated and at about 4.00 p.m, he expired. Before that, he had given an oral dying declaration to his brother Usuf and Ahmed Shaikh, his neighbour. The accused was arrested on 20th January 1988. The statement of witnesses were recorded. Charge-sheet was filed and the trial court convicted the accused u/s.304 II of the IPC and sentenced him to suffer RI for 7 years.

2. The learned counsel appearing on behalf of the appellant submitted that there was a discrepancy in the statement of Dr.Mulla and the other Dr.Bhaskar Prani PW no.10 who had operated the deceased. He submitted that from the discrepancy in the statement of these two doctors, the evidence of Dr.Mulla become unreliable. He submitted that therefore the case of

Dr.Mulla that he had admitted the deceased in the casualty ward and that the deceased had informed him that Namdeo had assaulted him became very doubtful. He submitted that the medical register which was produced clearly establish that the name of Namdeo was subsequently added and then initially when Shiraj was admitted in the hospital, the name of the accused was not known. He submitted that the register and the case diary which was produced on record also clearly establish that initially when the message was received from the hospital, the name of the accused was not mentioned. He submitted that according to Dr.Mulla, the pulse rate of the deceased was 88 and that he was not breathless. However, Dr.Prani PW no.10 who operated the deceased has stated that the pulse rate of the patient was 104 p.m. He further stated that PW no.10 has stated that after the patient was admitted initially Dr.Deshpande examined him and thereafter he was examined by PW no.10 and Dr.Kochikar. Dr.Prani, PW no.10 does not take the name of Dr.Mulla at all in his entire deposition. He submitted that therefore, the theory of dying declaration is recorded by the police and the admission of the patient by Dr.Mulla became very doubtful and could not be relied upon. He submitted

that the evidence of Usuf PW no.3 was not reliable as he was an interested witness. He further submitted that the prosecution had tried to create a case that the deceased was last seen in the company of accused and that after the assault, the deceased had given oral dying declaration to his brother, then to Dr.Mulla and to his neighbour Shaikh. However, this theory was not put beyond reasonable doubt.

3. The learned APP appearing on behalf of the State on the other hand submitted that there was no reason for the aunt of the accused to depose against him. He submitted that the aunt of the accused had stated that the accused had visited her house alongwith the deceased in the afternoon and had taken tea at her house. Further, the learned APP submitted that before proceeding to Sangli, the accused had visited the house of the deceased initially in the morning and thereafter in the afternoon at 12 noon and that Usuf had seen the accused in the company of the deceased and they had proceeded together to Sangli. The learned APP therefore, submitted that the accused thereafter had informed Dr.Mulla that the accused had assaulted. His statement was thereafter recorded by PI Dholam. It was submitted that

therefore, the prosecution had established the chain which clearly pointed out towards the guilt of the accused. He submitted that there was no missing link in the change of circumstances.

4. I have heard the learned counsel appearing on behalf of the appellant and the learned APP at length. With the assistance of the learned counsel for the appellant, I have perused the oral and documentary evidence on record and also the judgement and order of the trial Court.

5. The prosecution has examined 13 witnesses. PW no.1 Balasaheb Mane is a rickshaw driver from Sangli. He has stated that on 9th November 1987, one person had come from Aripur road and had told him to take him to any hospital. He had taken him to the Civil hospital. The learned APP took permission of the Court to cross examine the witness. This witness does not support the prosecution case. PW no.2 is Nandkumar Patwardhan. This witness also has not supported the prosecution case. He was working as a waiter in hotel Parag. He has stated that he noticed one person going towards the S.T. stand with his hand on the stomach. This witness also is not of any

assistance to the prosecution. PW no.3 is the brother of the deceased. PW no.3 Usuf has stated in his evidence that the accused had gone to Sangli along with the deceased Shiraj and at 9 p.m, the police had taken him to the hospital where the deceased was admitted and the deceased had told him that Namdeo had assaulted the deceased with a knife. In the cross-examination, it is brought on record that in the statement recorded by the police, it was not mentioned that the accused had taken Shiraj to Sangli. It is difficult to accept the evidence of these witnesses particularly when his statement was recorded on 12th November 1987 and incident in question had taken place on 9.11.1987 and till that time, this witness had not disclosed anything to the police. This witness has obviously made improvements in his deposition before the Court and for the first time, he has stated in the Court that the accused had come to the residence at 12 noon and had taken his brother to Sangli. The evidence of this witness therefore cannot be considered as he is totally unreliable and also is an interested witness.

6. The prosecution has thereafter examined PW no.4 Rukmini Mane and the aunt of the accused. She

has stated that on the date of the incident, the accused had gone to her house with his friend and they had tea and thereafter had went away. In the cross examination, this witness has admitted that there wasa dispute between her and accused Namdeo's sister Saraswatibai and the same was pending in the Civil Court. It is not possible to accept the evidence of this witness. Her statement was recorded on 21st January 1988 i.e. one day after the arrest of the present accused. This witness has not stated the name of the deceased in her examination in chief. An attempt has been made by the prosecution to prove that the accused was last seen in the company of the deceased by examining PW no.3 Usuf and Pw no.4 Rukmini. Thereafter, prosecution has examined PW no.5 Suresh Kininge. This witness was the panch who was examined to prove panchnama of the scene of the offence. This witness has turned hostile. The other panch has not been examined by the prosecution. The scene panchnama is not proved by independent panchas. The prosecution has thereafter examined Ahmed Shaikh PW no.6 who was the neighbour of Shiraj. He has stated that he had gone to the Civil hospital at Sangli along with his friend and at that time, Shiraj had told him that Namdeo had assaulted him with a

knife. However, in cross examination he has stated in his statement which was recorded on 12.11.1987 that he had disclosed the said fact of the assault. The evidence of this witness also cannot be relied upon. As none of the witnesses have stated that Ahmed was present in the hospital after the operation was performed infact, the operation was performed and thereafter at midnight according to Dr.Prani PW no.10 the patient regained consciousness at one midnight and thereafter he was conscious till 10.00 a.m. on the next day. Thus, there was no occasion for Ahmed to have talked with deceased Shiraj after the operation. PW no.7 is the Medical Officer Arvind Zingare who had performed the post mortem of deceased Shiraj. PW no.8 is the Investigating Officer Shyam Dholam. He has stated that the information was received at Sangli City Police station and Shiraj had received a stab injury and was admitted in the hospital. He made an entry of that information in the station diary and went to the Civil hospital, Sangli. According to him, he contacted Dr.Mulla and told him that the injured was conscious and was in a position to speak. According to him, he recorded the statement of the injured and affixed his thumb impression. According to him, the said statement was

recorded at 8.45 p.m. on 9.11.1987 and he had sent a statement with the constable in the police station to register the offence. PHC Zingare then registered the offence. In the cross examination however, he has admitted that he had not taken the certificate of the doctor on the statement regarding the condition of the injured. He had further stated that the constable who had taken the report to the police station had put the date on the report as 10.11.1987. Further, he has admitted that he did not know the name of the injured when he left the police station to go to the hospital. Further, he has admitted that he had not taken any report from Dr.Mulla about the condition of the injured. Similarly, he had not taken the report from Dr.Prani regarding the condition of the injured. He has admitted that Dr.Prani was present near the patient at the time when he started recording his statement. Dr.Prani who performed the operation has stated in his evidence that the patient was operated at 9.00 p.m. Further, he has stated that at 8.45 p.m, the patient was posted for laparotomy room. Thus, from the evidence of PW no.10 Dr.Prani, it is difficult to believe the statement of PI Dholam PW no.8 that the statement of Shiraj was recorded at 8.45 p.m. on

9.11.1987. The police constable who had taken the statement has put the date on the statement as 10.11.1987. Dr.Prani has stated that the patient was in the laparotomy room at 8.45. From all these circumstances, it is difficult to believe that the statement of injured Shiraj was recorded at 8.45 p.m. on 9.11.1987. Further, it is not possible to believe that the injured Shiraj was in a fit condition to make a statement as PI Dholam Pw no.8 has admitted in his cross that he had not taken the certificate of the doctor on the statement about the condition of the injured. It is not possible to rely on the statement of the deceased which was recorded since it was not possible for Dholam to have recorded the statement of the injured Shiraj as he was already taken to the laparotomy room at 8.45. The statement of PW no.10 also became doubtful particularly when PW no.10 has not mentioned his name in his statement though he refers to the patient being examined by Dr.Deshpande and Dr.Kochikar. He does not mention that Dr.Mulla was present at the time when Shiraj was admitted in the hospital.

7. Thus, the statement of PW no.6 Ahmed Shaikh, the brother of Shiraj , Usuf also will have to be

discarded as firstly PW no.3 Usuf is an interested witness and Ahmed Shaikh was a neighbour of Shiraj also cannot be relied upon as he says that when he had gone to the hospital, Shiraj was in the operation theatre and on the next day morning, Shiraj according to him regained consciousness and informed Ahmed and Usuf that Namdeo had assaulted him with a knife. This is not corroborated by the evidence of Dr.Prani who has stated that Shiraj had regained consciousness at 10.00 a.m. on the next day. He does not state that after regaining consciousness, he was allowed to meet anybody and that thereafter he had died at 4.00 p.m. Thus, there is no evidence to show that Shiraj had a conversation with his family members after he regained consciousness. Thus, it is difficult to accept the prosecution case. The prosecution in my view has not proved beyond reasonable doubt that the accused had committed murder of deceased Shiraj.

8. The applicant under the circumstances, will have to be acquitted of the offence with which he was charged. The judgement and order of the trial Court is set aside and quashed. Appeal is allowed. The bail bonds of the appellant stand cancelled.

V.M.KANADE, J